



TRUSTEES FOR ALASKA

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September 28, 2020

Via U.S. Mail and E-Mail:

Mr. Shane McCoy
Program Manager, Regulatory Division
U.S. Army Corps of Engineers
645 G. St., Suite 100-921
Anchorage, AK 99501
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Re: Request for Permit Denial re Permit Reference Number POA-2017-00271 for the Proposed Pebble Project

Dear Mr. McCoy:

Trustees for Alaska submits these supplementary comments on behalf of the Alaska Center, Alaska Community Action on Toxics, Alaska Wilderness League, Audubon Alaska, Center for Biological Diversity, Cook Inletkeeper, Defenders of Wildlife, Earthjustice, Eyak Preservation Council, Friends of Alaska National Wildlife Refuges, Friends of McNeil River, McNeil River Alliance, National Parks Conservation Association, National Wildlife Federation, Natural Resources Defense Council, and the Sierra Club. On September 21, 2020, the Environmental Investigation Agency (EIA) publically released a series of recorded conversations between EIA investigators and the Chief Executive Officers of Pebble Limited Partnership (PLP) and its parent company, Northern Dynasty Minerals (NDM).¹ These conversations, referred to as “the Pebble Tapes,” reveal that PLP submitted an application that fundamentally misrepresents the project, undermining not only the environmental analysis under the National Environmental Policy Act (NEPA), but the legitimacy of the application under the Clean Water Act (CWA). In addition, the Pebble Tapes reveal that PLP has deceived the public through the permitting review process and subverted the permit review process through improper political interference. That interference extends to staff of the U.S. Army Corps of Engineers’ (Corps), including David Hobbie, Chief of Alaska District’s Regulatory Division. Because PLP’s application is

¹ See Environmental Investigation Agency, *The Pebble Tapes*, Sept. 21, 2020, <https://eia-global.org/reports/20200921the-pebble-tapes> (Attachment #1 to these comments). These recorded conversations are material to the U.S. Army Corps of Engineers’ review of the proposed Pebble Mine and must be considered by the agency as part of the administrative record. Both the video recordings and transcripts (Pebble Tapes transcript) are included as attachments to these comments (Attachment #2 – EIA video recordings; Attachment #3 – EIA transcript of video recordings). Due to size, copies of the video recordings (Attachment #2) are included on a USB flash drive and included with the hard copy of this letter sent via U.S. mail.

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illegitimate and does not portray its real intent, the U.S. Army Corps of Engineers' (Corps) must deny the permit.

The recorded conversations provide critical information about PLP's true ambitions and intent and significantly undermine aspects of the Environmental Impact Statement (EIS) review. The recordings reveal that the project presented by PLP in its application and reviewed by the Corps is not the project that PLP and NDM intend to build. The actual project will not only have environmental impacts not considered by the Corps, but will change the project in ways that render the current EIS incapable of satisfying the Corps' obligations under NEPA and the CWA. Due to the revelations provided by EIA, which come from PLP and/or NDM directly,² the Corps must deny the permit. Nothing precludes PLP from resubmitting a proposed project that reflects its true intentions. Should the Corps receive a revised application that mirrors the statements made by its CEOs, the Corps would necessarily need to reinitiate the NEPA and CWA review process with a notice of intent to conduct an entirely new NEPA and CWA review. This process is the only way for the Corps to ensure it meets the mandate of NEPA to provide the public with an opportunity to meaningfully participate and comment on the actual project proposed. The EIS must assess a proposed project that matches the actual, real, and verbally communicated intentions of PLP and NDM. Of note, these intentions include abandoning the 20-year mine proposal and related closure plan, and instead mining for up to 200 years.

EIA, in an accompanying press release to its release of the Pebble Tapes, provides the following context:

Tom Collier, the CEO of Pebble Limited Partnership, and Ronald Thiessen, the president and CEO of Northern Dynasty, of which Pebble is a wholly-owned subsidiary, spoke with EIA investigators during August and September after the investigators expressed interest in investment opportunities related to the Pebble project. Their conversations, which were recorded, contain multiple statements by Collier and Thiessen that contradict, or in some instances color, previous public statements by company executives as well as assertions in official company materials that Pebble is intended to be only a small 20-year mine, as described in the Clean Water Act permit application for the project.³

The conversations between Collier,⁴ Thiessen and the EIA investigators, posing as interested investors, are nothing short of startling. Both Thiessen and Collier undermine significant aspects

² Although PLP and NDM have acknowledged the Pebble Tapes, they have not denied the contents of the recordings.

³ Environmental Investigation Agency, *Pebble Mine Tape Reveal Plans to Build massive 180-Year Mine at the Headwaters of Bristol Bay in Alaska*, Sept. 21, 2020, <https://eia-global.org/press-releases/20200921-pebble-mine-tapes> (Attachment #4 to these comments).

⁴ Subsequent to the release of the Pebble Tapes, Tom Collier resigned as CEO of PLP. See <https://www.washingtonpost.com/climateenvironment/2020/09/23/pebblemine-secret-tapes/>, Washington Post, Sept. 23, 2020.

of Pebble's proposed action as described in its permit application and reviewed in the EIS. Perhaps most alarming is the fact that both Thiessen and Collier admit that closure after 20 years will not happen.⁵ Not only do they state that the mine will not close after 20 years, but they assert that the milling rate will drastically increase.⁶ Further, Thiessen acknowledges that the current project proposal accommodates mill expansion and that is part of their plan.⁷

In light of the numerous statements from both Collier and Thiessen, the project currently being considered by the Corps is not the project the applicant intends to construct and operate.⁸ This is critically important because the proposed project underestimates the actual impact of the project. This has a direct bearing on the Corp's evaluation both under NEPA and the CWA's 404(b)(1) Guidelines. Because the project application is based on a plan to close operations after 20 years, contrary to the project proponents' actual intent, the analysis presented in several chapters of the EIS fails to accurately assess or disclose the full extent of environmental impacts from a mine that is multiple times larger and the actual risk of failure events like tailings breaches, water treatment failures, and spills. The analysis in the EIS is based on the fundamental presumption that at closure all mine waste will be placed back into the pit. This approach, which is inconsistent with the project proponents' stated intention to continue mining, directly informs the Corps' consideration of tailings failure risk and water treatment requirements, among other issues. Because the post-closure plan analyzed in the EIS does not comport with PLP's and NDM's actual plan for operations, the Corps' current EIS and 404(b)(1) reviews do not satisfy the agency's obligations under NEPA and the CWA.

⁵ See Attachment #3, Pebble Tapes Transcript at 2 (Thiessen stating the mine is unstoppable and that no one is "gonna stop a mine ... that lasts 180 years"); at 3 (Collier saying that there is almost a 100% chance for expansion and that future permitting will not be as rigorous); at 33 (Thiessen stating that the "mine is not gonna be finished for 180, 200 years"); at 39 (Thiessen stating that "I mean listen the first mine is 180 years long"); at 40 (Thiessen stating that the they are planning on expanding and "[t]he most obvious way is [to] extend the mine life, the mining license by 20 to 40 years ... and then the other expansion potential is to expand the mil from 180,00 tons a day to say 320,000 tons a day.")

⁶ *Id.* at 2 (Thiessen noting that the mill rate will grow from 160,000 tons per day to 260,000 or 320,000 tons per day over the next 20-30 years); at 4 (Thiessen noting that the northern corridor can, as proposed, handle expansion of the milling rate to 220,000 tons per day); at 39 (Thiessen stating that "I mean listen the first mine is 180 years long"); at 40 (Thiessen stating that the they are planning on expanding and "[t]he most obvious way is [to] extend the mine life, the mining license by 20 to 40 years ... and then the other expansion potential is to expand the mil from 180,00 tons a day to say 320,000 tons a day.")

⁷ *Id.* (Thiessen stating that the infrastructure, submitted as part of the permitting process, has expansion capacity planned into it); at 40 (Thiessen acknowledging that they told the Corps about their intent for expansions and that NDM has an image of the 425 square miles with several little dots representing other potential mine sites, which the Corps was aware of but has not been made public).

⁸ As courts have noted, the Corps can only consider an applicant's legitimate objectives. See e.g. *Audubon Soc'y of Greater Denver v. United States Army Corps of Engineers*, 908 F.3d 593, 607 (10th Cir. 2018); *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1269-70 (10th Cir. 2004); and *National Wildlife Federation v. Whistler*, 27 F.3d 1341, 1346 (8th Cir. 1994).

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Nor can the Corps cure this defect at a later date by conducting a supplemental NEPA review years from now when PLP and NDM formally apply for authorization to continue mining beyond 20 years. A decision to continue mining would not merely expand the mine's footprint, it would fundamentally change the plans for handling water and toxic materials. Given that the 20-year-mine closure plan is central to the EIS review, that it is inconsistent with any plan to continue mining, and that PLP and NDM have made clear that they do intend to continue mining, the Corps must deny the permit or conduct the supplement NEPA review, as described above, base on a resubmitted CWA application that accurately portrays the project.

As several of the undersigned groups noted in comments on the Final EIS (FEIS) submitted August 23, 2020, the FEIS is substantially flawed and inadequate. The EIA-released conversations confirm and further indicate major flaws with the EIS review and that the PLP's application is not legitimate. Consistent with the CWA, the Corps cannot accept the illegitimate application, or the review based on that illegitimate application. For these reasons, the Corps must deny the permit.

Sincerely,

A handwritten signature in dark ink, appearing to read "Brian Litmans", written in a cursive style.

Brian Litmans
Legal Director
Trustees for Alaska

Enclosure: Attachments identified above.

cc:

Regional Administrator Hladick, U.S. Environmental Protection Agency, Region 10
Regional Director Greg Siekaniec, U.S. Fish and Wildlife Service, Alaska Region